IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

Case No. 77-5787

JAMES K. WEIND,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO
BRIEF FOR RESPONDENT IN OPPOSITION

George C. Smith
Prosecuting Attorney
Franklin County, Ohio

Ronald J. O'Brien
Assistant Prosecuting Attorney
Hall of Justice
369 South High Street
Columbus, Ohio 43215
614/462-3555

Counsel for Respondent

INDEX

CITATIONS

STATUTES; MISCELLANEOUS:

STATUTES; MISCHELLANEOUS (cont'd):

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

Case No. 77-5787

JAMES K. WEIND,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

OPINION BELOW

The opinion befow is reported at State v. Weind 50 Ohio St. 2d 224 (1977), with correction of error occurring at page 241 of that opinion reported at 51 Ohio St. 2d 18 (1977). The opinion is correctly set forth in the appendix to the petition. The correction of error is omitted from the appendix to the petition and is attached hereto as Appendix A.

JURISDICTION

Jurisdiction is invoked by petitioner pursuant to Title 28 U.S.C, Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. DOES THE OHIO STATUTORY SCHEME FOR THE IMPOSITION OF CAPITAL PUNISHMENT VIOLATE THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

2. WAS PETITIONER DENIED ANY RIGHT UNDER THE FIFTH, SIXTH, OR FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT OVERRULED PETITIONER'S PRE-TRIAL MOTION FOR A CONTINUANCE?

3. WAS IT CONSTITUTIONAL ERROR WHEN THE STATE TRIAL COURT JUDGE, WITHOUT REQUEST FROM DEFENSE COUNSEL, FAILED TO SUA SPONTE INSTRUCT THE JURY DURING THE TRIAL TO DISREGARD PRIOR REFERENCES TO A TAPE RECORDING WHEN SUCH RECORDING WAS RULED INADMISSIBLE FOR IMPEACHMENT PURPOSES, AND WHEN DEFENSE COUNSEL DID NOT REQUEST SUCH AN INSTRUCTION WHEN THE JURY WAS CHARGED?

STATEMENT OF THE CASE

Daniel Miles was employed by a 24-hour retail outlet, Ontario Foods, located at 1780 Morse Road. On the particluar date in question, December 15, 1974, he was in charge of store personnel and had arrived at work at 7:00 a.m. Hermalee Ross was employed at the store and was expected at work at 8:30 a.m.

When she did not arrive, Miles started looking for her. When he could not find her, he contacted the police. Their initial response was that twenty-four (24) hours would have to elapse before reporting a missing person. Shortly thereafter, an elderly couple entered the store with a set of car keys which were thought to belong to Mrs. Ross's Volkswagen.

Miles testified that he then went outside, saw the Volkswagen and blood on a white car parked next to it. On the ground was an earring partially covered with blood. (State's Exhibit 12)

Miles then said the police were contacted a second time.

Walter Lee Brock, who was a meat cutter employed by Ontario, testified that he drove his 1967 white Ford Falcon to work and parked it about 6:45 a.m., December 15. During that morning, after the police arrived, Brock testified that he noted blood on his car, and that he was unaware of it being there previous to his arrival at work.

Lois Berg (employed as a dietician at Riverside Hospital) testified that she arrived at the laundromat entrance adjacent to Ontario's about 7:55 a.m. on December, 15, 1974. When the laundromat opened at 8:00 o'clock, she walked in and began doing her laundry. Shortly thereafter, Miss Berg testified she saw a black man with light complexion walk past the laundromat toward the Ontario Store and then on out to the parking lot. The man was wearing blue jeans, a blue jeans jacket and a print scarf.

She stated that the man went to a car, bluish-green in color; she identified it from a series of photographs police subsequently showed her. (State's Exhibit 18) The man went to the car and entered the passenger side; there was a pause of five to eight minutes before it drove away in an easterly direction on Morse Road.

Between 8:30 and 9:00 on the morning of December, 15, Dorothy Hale testified she was at her home located at 11380 Vans Valley Road, Delaware County. She was in her bedroom making the bed, located at the east side of the home. Approximately 150 yards east of the Hale home, on adjacent property, was an abandoned schoolhouse.

Mrs. Hale stated that at this time, she looked out her window and noticed a car stop in front of the schoolhouse and two people get out.

The two people then looked up and down the road and after looking into the schoolhouse, the pair took a female out of the car and led her to the schoolhouse. She could see movement inside and after about a minute and a half elapsed, the two men walked out and drove off. A short time later she called the police.

Howard Wayne Hale, her son, was in his bedroom on the other side of the house. He testified that his mother called to him and that when he went to her bedroom, he looked out the window and saw two people inside the schoolhouse. He watched them as they left and went to the car at a rapid walk. The car was bluish-green and either a Dodge or a Plymouth.

On December 20, 1974, both Mrs. Hale and Wayne Hale identified the car from a series of photographs given them by authorities. (State's Exhibit 18) Ron Price, a detective assigned to Homicide Division of the Columbus Police, identified the photo in State's Exhibit 18. Price said the car in the photo picked by the Hales and Miss Berg was owned by Kay Osborne.

Phillip Longshore, a deputy employed by the Delaware County Sheriff's Department, testified that he was the first officer at the scene

of the homicide. He testified that Edgel Ross arrived that morning and identified the body of his wife. It was stipulated at trial that the body found at the schoolhouse was that of Hermalee Ross.

Edgel Ross testified that his wife had left their home at 31 North Franklin Street, Hilliard, on the morning of December 15th at about 7:35 a.m. She left in her 1974 red Volkswagen which he identified as the one parked in the Ontario lot through State's Exhibit 3. He said she was expected to be at work at 8:30 a.m.

Robert Boswell testified that in December of 1974, he lived at 2209 Wabash Court, Apartment 111, and knew petitioner who lived in the same apartment complex.

Boswell stated that on the morning of the murder, some time around 10:30 to 11:00 a.m., the petitioner came to his apartment and told Boswell that he had something for him. Petitioner then gave Boswell a box with cotton in which there was a weapon; Boswell identified State's Exhibit 20 (a .25 Raven automatic) as the weapon given to him.

Boswell said that petitioner then left and that he began thinking about the gift. He then telephoned Michael Goins, who was also a neighbor, and told him about the transaction. Goins said he would be right over. When he arrived, Goins told Boswell that the "gun was hot".

Shortly thereafter, petitioner returned to the Boswell apartment and proceeded to relate to Boswell and Goins the killing of Hermalee Ross earlier that morning.

Boswell testified that petitioner told them that at the Ontario parking lot, he and Carl Osborne had abducted Mrs. Ross. During the course of the abduction, petitioner told Boswell that petitioner hit her on the head with a gun when the lady put up a struggle. Boswell stated that this gun was a .380 automatic and he identified State's Exhibit 37 as being the same type of gun. Weind also told Boswell that when he hit the woman, a piece of it broke off.

At the scene of the abduction, Officer Daniel Canada testified

that he collected two peices of metal which he identified as State's Exhibits 12E and 12F and also those photographed in State's Exhibits 13, 14 and 15. Ron Price believed that these two pieces of metal were off the trigger guard of a firearm. He testified that the two were taken to a number of gun stores in a attempt to find a matching firearm. He identified State's Exhibit 37 as the firearm purchased from a gun store in Hilliard as a result of the investigation.

Price said he gave the pieces of metal and the gun to Steve Molnar of the Bureau of Criminal Investigation, who testified that he made a comparison of the broken metal pieces with that of the purchased gun, State's Exhibit 37. It was Molnar's opinion that the "two pieces appear to be consistent with the configuration of the lower portion of the trigger guard [of the purchased weapon.]"

A purse was also found at the scene of the abduction. Edgel Ross testified and identified the purse (State's Exhibit 31) as the one his wife had when she left for work that morning.

Petitioner also told Boswell that he had to kick the lady in the stomach and that she grunted before they finally got her in the car.

Boswell testified that when Weind was telling of the incident, he was wearing a pair of blue jeans, a pair of clogs and a blue bandana. Weind told Boswell that the had just soaked the clogs to remove the blood. Weind also told them that Carl Osborne had shot the lady.

Boswell further related that after petitioner had "explained how he killed the woman", the object was to get rid of the gun. (State's Exhibit 20) Boswell said that he, petitioner, and Goins then drove in petitioner's car to the vicinity of Alum Creek. Boswell said that petitioner parked the car and walked toward the creek. He said he did not actually see petitioner throw the gun into the creek.

Boswell testified that during this conversation with petitioner and Goins, the subject of the second gun arose, namely, the one which petitioner said had two pieces of metal broken off. According to Boswell, Goins told petitioner he wanted some money for the gun.

Petitioner then told Goins he would give him something after the payoff which was coming from Mrs. Osborne and was supposed to be $500.

Ron Price, a detective assigned to the Homicide Division of the Columbus Police Department, testified that he was present on December 19, 1974, when the .25 automatic pistol (State's Exhibit 20) was retrieved by a fireman from the Alum Creek location. Price stated that the gun was in his possession until he presented it to Steve Molnar of the Bureau of Criminal Identification and Investigation.

Molnar testified at trial and included in his testimony was his opinion of .25 caliber bullets found at the scene of the crime and those test fired from the weapon retrieved from Alum Creek. After ballistics tests were run, Molnar stated it was his opinion that the bullets were fired from the .25 automatic, in addition to the bullets from the victim. (State's Exhibit 20)

Molnar additionally expressed his opinion with regard to the shell casings (State's Exhibit 35D) in comparison to casings that were test fired with the .25 automatic. His opinion was that the casings were all fired by the firing pin of the .25 Raven automatic. (State's Exhibit 20)

Debbie Zweydorff and Kay Osborne testified as to the whereabouts of petitioner on the evening of December 14 and that following morning.

Debbie testified that after work, she had gone to the Alberta Osborne residence located at 2395 Clarkston Lane. She worked with Kay at Woolworth's in Eastland and stated that she was going to a party at the Osborne house. Debbie stated that when she arrived there that evening, petitioner was there with Carl Osborne. Carl and petitioner then left in Kay's car which Debbie identified as a 1969 Plymouth Road-runner. (State's Exhibit 24)

Debbie stated that about 2:00 a.m. the next morning, she was getting ready to leave the Osborne household to attend a party elsewhere when Carl and petitioner arrived back in Kay's car. Debbie stated

she then left for the party and returned about 4:30 a.m.

She said when she walked in the house, Mrs. Osborne and Carl were still awake. They had been talking but stopped when they entered. Debbie stated that she then went to Mrs. Osborne's bedroom to go to sleep and that Kay came in later.

Shortly thereafter, Debbie testified that Carl Osborne came in the room and told Kay that he was going to take her car.

About 8:00 a.m. Debbie got up and was still at the Osborne residence at 10:00 a.m. when Carl Osborne and petitioner returned. She said that Carl told Mrs. Osborne to "come out and see this". Debbie stated the three remained outside for about a half-hour cleaning the car. When they returned, they looked for a professional car cleaner in the telephone book.

Kay Osborne testified and confirmed the event just stated including the fact that Carl Osborne came into the room and told Kay he was going to use her car.

She additionally stated that she did not get her car back until the next day, Monday, December 16. She said the car had been cleaned both on the inside and out. It also had new tires although in her opinion the tires which had been on the car were not ready to be replaced. She identified the car as the one photographed in State's Exhibit 24.

On the 26th of December, she stated she left home to live elsewhere because her mother had been threatening her.

Stephen D. Lucas, a mechanic working at the Shell Oil Station on 2191 South Hamilton Road, testified that on December 16, 1974, he serviced a 1969 Plymouth which he identified as the one pictured in State's Exhibit 24. He stated that Mrs. Osborne drove the auto in and that about a half-hour later, Carl Osborne and petitioner came in.

Lucas stated he changed all four tires on the vehicle plus the spare, the latter only after petitioner came up to Lucas and told him the he had sold the fifth tire.

Lucas stated the five tires were placed in the trunk of the Plymouth.

Edge Ross testified as to the relationship he had with Alberta Osbone. He said that he had known her for about five years and that their relationship was "sex". Ross further testified that he owned a home in Red Bush, Kentucky, and that about four to six weeks prior to December 15, he was at this Kentucky location.

Ross stated that while he was there, Mrs. Osborne met him there and that their conversations included the fact that Ross and his wife had decided to move to this Kentucky residenee. Ross said that Mrs. Osborne then said "What happens to me?" and that his response was, "You and Carl are getting married and you're on your own."

Petitioner was indicted on three counts: (a) kidnapping, section 2905.01, Revised Code; (2) aggravated murder with two specifications, kidnapping and for hire; and (3) aggravated murder while committing kidnapping with two specifications, kidnapping and for hire.

Petitioner was tried before a jury and found guilty of all counts and specifications.

A mitigation hearing was held under section 2929.04, Revised Code, and the trial court found that none of the three migitating factors were shown by a preponderance of the evidence and the petitioner was sentenced to death.

The judgment, conviction, and sentence were affirmed by the Franklin County Court of Appeals and the Ohio Supreme Court.

REASONS FOR DENYING THE WRIT

1. THE OHIO STATUTORY SCHEME FOR THE IMPOSITION OF CAPITAL PUNISHMENT IS CONSISTENT WITH THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHICH FORBIDS CRUEL AND UNUSUAL PUNISHMENTS, AS APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSITUTION.

Introduction

Respondent, State of Ohio, respectfully submits that the statutory provisions, and procedure, for the imposition of capital punish-

ment in Ohio are consistent with the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment to the United States Constitution.

As separately discussed below, the death penalty in Ohio, as applicable to premiditated and felony-murder, when specified aggravating circumstances are present and no mitigating circumstances exist, is not so grossly disporportionate to the offense.

Nor is the penalty wantonly and freakishly imposed, in an arbitrary or capricious manner, so as to run afoul of the Eighth Amendment or violate the dictates of Furman v. Georgia 408 U.S. 238 (1972). Specific guidelines, in the name of aggravating and mitigating circumstances, provide the necessary control on discretion, focusing on the offenses and the offender.

As a constitutionally indispensable part of the process of inflicting the death penalty in the state of Ohio the circumstances, character, and record of both the offense and the offender are considered in conformity with this court's decisions last term in Gregg v. Georgia 428 U.S. 153 (1976), Proffitt v. Florida 428 U.S. 242 (1976), Jurek v. Texas 428 U.S. 262 (1976), Woodson v. North Carolina 428 U.S. 280 (1976), and Stanislaus Roberts v. Louisiana 428 U.S. 325 (1976).

Once convicted, a death penalty defendant has an appeal as of right under the Constitution of the State of Ohio to both an intermediate appellate court and the Ohio Supreme Court. The explicit nature of the specifications of aggravating circumstances and mitigating circumstances allows effective judicial review to assure that the penalty is imposed fairly and not arbitrarily.

For these reasons, fully set forth below, the Respondent submits that the framework for the imposition of capital punishment in the State of Ohio is constitutional.

1. The Crime

In the State of Ohio the only crime for which capital punishment

may be imposed is Aggravated Murder (Section 2903.01 O.R.C.). The crime is analogous to what was formerly called First Degree Murder in Ohio (Section 2901.01, 1953 O.R.C.), and other states.

That statute provides:

> "Sec. 2903.01 (A) No person shall purposely, and with prior calculation and design, cause the death of another.
> (B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
> (C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the revised code."

The relevant culpable mental state of "purposely" is defined in Section 2901.22(A)O.R.C. as follows:

> "Sec. 2901.22 (A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature,"

The death penalty may be imposed only for purposeful, planned murders and for purposeful killings during the course of designated felonies.

Unless the existence of an aggravating circumstance listed in Section 2929.04(A) O.R.C. is alleged in the indictment, the penalty for Aggravated Murder is life imprisonment. See Section 2929.03(A) and 2941.14(B) O.R.C.

2. Aggravating Circumstances

One, or more, of the seven aggravating circumstances listed in Section 2929.04(A) O.R.C. must be alleged in the indictment and proven beyond a reasonable doubt or the death penalty is precluded. See 2941.14(B) O.R.C.

The aggravating circumstances are as follows:

"(1) The offense was the assassination of the President of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or, of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing or attempt to kill another, committed prior to the offense at bar, or, the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

Two of the aggravating circumstances deal with the status of the victim as a public official or a law enforcement officer. However, the status of the victim alone does not permit imposition of the death penalty, as did the statute considered in Harry Roberts v. Louisiana ___ U.S. ___, 20 U.S.L.W. 3083, 21 Cr. L. 3076 (rendered June 6, 1977).

The remaining five aggravating circumstances consider the nature, status, character, or record of both the offender and the offense committed.

In addition to the verdict as to the substantive offense of aggravated murder, the verdict must include separate findings as to the specification of aggravating circumstances. A guilty verdict for the crime, but not guilty as to the specified aggravating circumstance, results in a life sentence.

3. Procedure after conviction for the crime of aggravated murder and a finding of guilty as to an aggravating circumstance

The Ohio law provides for a bifurcated procedure in capital cases as to guilt and sentence. The jury, or a panel of three judges if right to trial by jury is waived, determines guilt or innocence as to the crime and the specified aggravating circumstances. The presiding Judge at a jury trial, or the three judge panel if jury is waived, determines sentence.

After conviction for the crime and an aggravating circumstance, the court must order a pre-sentence investigation and a psychiatric examination. Contrary to the practice in Gardner v. Florida ___ U.S. ___, 20 Cr. L. 3083, Section 2929.03(D) O.R.C requires that copies of both the pre-sentence and psychiatric report be furnished to the offender or his counsel.

The pre-sentence investigation and report is prepared pursuant to Rule 32.2(B), Ohio Rules of Criminal Procedure, which provides:

> "(B) Report
>
> The report of the presentence investigation shall state the defendant's prior criminal record, the circumstances of the offense, and such information about defendant's social history, employment record, financial ability and means, personal characteristics, family situation, and present mental condition, as may be helpful in imposing or modifying sentence or providing rehabilitative or correctional treatment, and shall state such other information as may be required by the court. Whenever the court, probation officer, or investigator considers it advisable, the investigation may include a physical and mental examination of the defendant."

This report of the history, character, and record of the individual offender along with the circumstances of the particular offense is submitted to the sentencing authority.

A mitigation hearing is held to consider those reports, testimony, other evidence, and arguments on the subject of penalty which should be imposed. The offender may make a statement to the court, which need not be under oath, and such is subject to cross-examination only if the statement is made under oath. See Section 2929.03(D) O.R.C.

The judge, or three judge panel if applicable, then considers all relevant information as it relates to the existence of one or more of the three migitating circumstances set forth in Section 2929.04(B) O.R.C.

If a mitigating circumstance is shown to exist by a preponderance of the evidence the penalty is life imprisonment. If no mitigating circumstance is found to exist by a preponderance the death penalty is imposed. Section 2929.03(E) O.R.C.

4. Mitigating Circumstances

Section 2929.04(B) O.R.C. sets forth the relevant factors to be considered by the sentencing authority and the mitigating circumstances as follows:

> "(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence of the evidence:
> (1) The victim of the offense induced or facilitated it.
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

As noted previously, the specified aggravating circumstances are directed to the offense and offender.

The statute as to mitigation likewise directs the attention of the sentencing authority to the nature, circumstances, character, and condition of the offender and the offense.

In State v. Bayless 48 Ohio St. 2d 73, 357 N.E. 2d 1035 (1976), the first case upholding the Ohio death penalty statute, the court noted that this statute on mitigation and the mitigating factors, as with any legislation, may require judicial interpretation and clarification. Bayless, supra, at 86. The court further noted that these mitigating factors were to be strictly construed, in favor of the defendant, to allow the broadest consideration of the mitigating circumstances.

In the subsequent case of State v. Woods 48 Ohio St. 2d 127, 358 N.E. 2d 1059 (1976), the second branch of the syllabus, which is the law of the case, see Cassidy v. Glossip 12 Ohio St. 2d 17, 24, 231 N.E. 2d 64 (1967), set forth the meaning and standard to be utilized when considering duress or coercion as a mitigating circumstance under section 2929.04(B)(2) O.R.C. The court held that this circumstance was to be construed more broadly than the defense of duress, and that this mitigating factor turned on the circumstances of each individual case, including the character of the one sought to be influenced, supra, at 135, and the nature and circumstances of the offense, the history, character and the condition of the offender, so as to temper punishment out of consideration of the individual offender and his crime. Supra at 137, citing Williams, v. New York 337 U.S. 241 (1949).

Likewise, in State v. Black 48 Ohio St. 2d 262, 358 N.E. 2d 551 (1976), in construing the third mitigating factor, the first branch of the syllabus held that the sentencing authority should use the broadest possible latitude in determining the offender's mental state should be considered in light of all the circumstances, including the nature of the crime. Against a claim that the mitigating term was not

specifically defined, or was too narrow, the court stated that broadly defined and however evidenced any mental state or incapacity may be considered in light of all the circumstances. Supra at 268.

In State v. Bell 48 Ohio St. 2d 270, 358 N.E. 2d 556 (1976) in the second branch of the syllabus, the court held that the age of the offender and prior criminal record are relevant factors to be considered in determining the existence of mitigating circumstances under section 2929.04(B)(2) and (3) O.R.C. In the opinion, the court indicated that age was a primary factor in determining the existence of a mental deficiency, both minority and senility being relevant. Supra at 282.

Thus it may be seen that all relevant information is, or may be, presented to the sentencing authority which by statute, and construction of the mitigating circumstances, then determines whether society's best interests are served by exacting the ultimate penalty. This decision is based on the circumstances of the particular offense and particular offender,

This procedure complies with the Eight Amendment and the dictates of this court's decisions last term, with the Ohio procedure closely analagous to the procedure upheld in Profitt, supra, and Jerek, supra.

5. Appellate Review

The court of common pleas, in each of Ohio's eighty-eight counties, is the court with general and subject matter jurisdiction in Aggravated Murder cases for which the death penalty may be imposed.

A court of appeals, with geographical jurisdiction of one or more counties, reviews criminal convictions, judgments, and sentences from the court of common pleas. A defendant upon whom the death penalty has been imposed has an appeal as a matter of right to the court of appeals. Article IV section 3, Ohio Constitution. If a timely notice of appeal is not filed a defendant may seek review as a delayed appeal under Rule 5, Ohio Rules of Appellate Procedure.

A death penalty defendant has an appeal as a matter of right to the Ohio Supreme Court, where the conviction and sentence in a capital case has been affirmed by the Court of Appeals. Article IV, Section 2(B)(2)(a)(ii), Ohio Constitution.

An aggrieved defendant in a capital case, as a matter of right, may have his conviction reviewed by the Court of Appeals and the Ohio Supreme Court.

In State v. Bayless, 48 Ohio St. 2d 73, 357 N.E. 2d 1035 (1976) the Ohio Supreme Court noted its duties and responsibility in reviewing a capital case, supra, at 86:

> "[T]his court has a particular opportunity and responsibility to assure that death sentences, which may be brought to this court for review as a matter of right, are not imposed arbitrarily and capriciously. We have in this case, and will in all capital cases, independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges."

Respondent would note that the explicit guidelines contained in the stautory framework for capital punishment facilitates this type of review.

As was noted in State v. Miller 49 Ohio St. 2d 198, 361 N.E. 2d 419 (1977) at 204:

> "This statewide method of review does serve to insure against the arbitrary and uneven imposition of the death penalty."

Based on the foregoing, Respondent submits that appellate review in the state of Ohio will assure fairness and even imposition of the capital penalty.

6. Conclusion

For each of the foregoing reasons, briefly stated, the Respondent, State of Ohio, respectfully submits that the imposition of capital punishment, and the statutory procedures, do not run afoul of the Eighth Amendment, and the writ should be denied.

2. THE PETITIONER WAS NOT DENIED ANY RIGHT SECURED BY THE FIFTH, SIXTH, OR FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT DENIED A PRE-TRIAL MOTION FOR A CONTINUANCE.

It is the Respondent's position herein that a request for a continuance is a matter for the trial court's discretion, does not constitute grounds for reversal unless there is a clear abuse of discretion; and where the reason for such request is based upon an alleged inability to adequately prepare a defense an appellate court will review the record to determine if counsel for the defendant performed their duties thoroughly, intelligently and well; and where trial counsel states the defense is ready to proceed when the case is called and performs zealously and competently, a conviction will not be reversed based upon denial of a continuance.

Petitioner herein was arrested on December 24, 1974, and held without bond insofar as it was a capital case. The matter was set for trial on February 18, 1975, cognizant of the duty to bring petitioner to trial within ninety (90) days pursuant to section 2945.71, et. seq., Revised Code.

On January 28, 1975, petitioner requested a continuance of that trial date, the principal reason being the lack of full discovery.

The state filed extensive type-written discovery on February 4, 1975, and petitioner filed a supplemental request for continuance on the next day alleging an inability to adequately prepare for trial.

When the case was called for trial by the court on the assigned date, the court asked defense counsel if he was ready to proceed. Trial counsel stated to the court, "The defense is ready, your Honor."

A request for continuance is within the broad discretion of the trial court and the denial of same will not result in reversal unless there is a clear abuse of discretion or a denial of a constitutional right. State v. Bayless (1976), 48 Ohio St. 2d 73, 101.

The state submits that under the facts herein there was no abuse of discretion by the trial court and a specific constitutional right

is not set forth as having been violated.

In addition, the Ohio Supreme Court looks to the record to determine if a defendant received competent, intelligent, earnest counsel performing thoroughly and well. State v. Price (1973), 34 Ohio St. 2d 43, 47; State v. Bayless (1976), 48 Ohio St. 2d 73, 101.

Herein a review of the record by the court disclosed earnest, competent and intelligent counsel for petitioner.

Finally, the statement to the trial court that the defense was ready to proceed militates against an allegation of inadequately prepared counsel or an abuse of discretion by the trial court.

For such reasons the writ should be denied.

3. IT WAS NOT CONSTITUTIONAL ERROR WHEN THE STATE TRIAL COURT JUDGE, WITHOUT REQUEST FROM DEFENSE COUNSEL, FAILED TO SUA SPONTE INSTRUCT THE JURY DURING THE TRIAL TO DISREGARD PRIOR REFERENCES TO A TAPE RECORDING WHEN SUCH RECORDING WAS RULED INADMISSIBLE FOR IMPEACHMENT PURPOSES, AND WHEN DEFENSE COUNSEL DID NOT REQUEST SUCH AN INSTRUCTION WHEN THE JURY WAS CHARGED.

It is the Respondent's position that where the prosecution cross-examines a witness by laying the foundation for impeachment by prior inconsistent statements and it is elicited that a tape recording exists, but the contents are not disclosed, and the court sustains a defense objection to the admissibility of such tape for impeachment purposes, and defense counsel does not request the trial court to instruct the jury to disregard mention of such tape, such unrequested instruction cannot be raised on appeal as error.

Michael Goins, who was called as a court witness, was cross-examined by the state as to statements made by him which were recorded, and which were inconsistent with portions of his testimony at trial.

The state moved the admission of such tapes to impeach the testimony of Goins relative to the prior inconsistent statements. The defense objected and the trial court sustained that objection. Neither the tape, or a portion thereof, was played for the jury.

At that time, defense counsel did not request the court to instruct

the jury to disregard prior mention of such tapes.

At the end of the trial when the jury was given instructions of law, defense counsel again did not request an instruction to disregard references to such tape recordings. It should be noted that defense counsel did submit proposed instructions in writing, as to other matters.

Apparently, petitioner contends that the failure of the trial court in sua sponte give such instructions was constitutional error.

The state submits that petitioner waived any right to such instruction, at the time his objection was sustained, by failing to request same. Further, such was not plain error.

The lack of such instruction at the close of the case is governed by State Criminal Rule 30, which states that any error in instructions must be objected to or such is waived.

For these reasons the writ should be denied.

CONCLUSION

For the reasons set forth above the Respondent, State of Ohio, respectfully submits that the writ of certiorari should be denied.

Respectfully submitted,

George C. Smith

George C. Smith
Prosecuting Attorney
Franklin County, Ohio
Member of the Bar of the Supreme Court
of the United States

Ronald J. O'Brien
Assistant Prosecuting Attorney
Hall of Justice
369 South High Street
Columbus, Ohio 43215
614/462-3555

Counsel for Respondent

CERTIFICATE OF SERVICE

Pursuant to Rule 33(3)(6) of the Rules of Practice of the Supreme Court, the undersigned, a member of the bar of the Supreme Court of the United States, hereby certifies that three (3) copies of the foregoing brief in opposition to the petition for a writ of certiorari were served upon James Kura, Public Defender, counsel for petitioner, by mailing same to his office at 400 South Front Street, Columbus, Ohio, 43215, by United States Mail, postage prepaid, this 10th day of January, 1978. I further certify that all parties required to be served have been served.

George C. Smith
Prosecuting Attorney
Franklin County, Ohio

Ronald J. O'Brien
Assistant Prosecuting Attorney
Hall of Justice
369 South High Street
Columbus, Ohio 43215
614/462-3555